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In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS G. HEYWARD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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Petitioner in this criminal tax case contends that the district court abused its discretion in admitting evidence showing that he was the owner of a marijuana-loaded airplane discovered in Georgia in February 1980, contending that the prejudicial effect of this evidence outweighed its probative value.

1. Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of attempted income tax evasion for 1978 and 1979, in violation of 26 U.S.C. 7201. He was sentenced to two years' imprisonment on each count, which sentence was then suspended and probation of three years imposed (Pet. App. A1). The court of appeals affirmed (Pet. App. A2) and denied a petition for rehearing (Pet. App. A3).

At trial, the government used the "net worth method" of proof to establish that petitioner received unreported income during 1978 and 1979. Under that method, the government must prove that the taxpayer's net worth increased during the tax years at issue and that he failed to report such increases as taxable income. In addition, the government must prove a likely taxable source for the increases or negate any plausible nontaxable sources therefor. See *United States v. Massei*, 355 U.S. 595 (1958); *Holland v. United States*, 348 U.S. 121 (1954).

The evidence showed that petitioner's net worth increased by \$34,552 during 1978 and by \$113,433 during 1979 (Tr. 265-266). Based upon these net worth increases, petitioner had unreported tax liabilities for those years of \$10,039 and \$45,888, respectively (*id.* at 274-275). Petitioner attempted to show a nontaxable source for these net worth increases by asserting that he had received \$175,000 in cash as the proceeds of a 1977 loan from one Robert Horan, who died in 1978 (Pet. App. A2, at 2). Petitioner, however, could not produce a note or other evidence of the claimed indebtedness (*id.* at 3). Moreover, Horan's widow, accountant, and business partner all testified that Horan did not have access to that amount of cash, that it would have been impossible for Horan to have made so sizeable a loan, and that they had never heard of petitioner before (*id.* at 2-3).

To prove a likely taxable source for petitioner's net worth increases, the government introduced evidence showing his involvement in drug smuggling. The primary evidence to this effect was testimony that, on February 5, 1980, an airplane that petitioner owned was found in Georgia loaded with over 4,000 pounds of marijuana (Pet. App. A2, at 10). The trial court admitted the evidence over petitioner's objection, and the court of appeals unanimously affirmed. It held that there was sufficient evidence to link petitioner to the plane's cargo (*id.* at 10-13), and that the discovery of the

plane in February 1980 was not "so temporally remote from the two previous years which were the subject of this indictment as to render the evidence inadmissible" (*id.* at 12). And the court rejected petitioner's contention that the evidence was more prejudicial than probative, noting that a trial judge "has wide discretion in this area," and holding that petitioner had not demonstrated any "extraordinary circumstances" that would warrant overturning the district court's exercise of discretion here (*id.* at 11 n.2).¹

2. The decision below is correct. The issues are essentially factual, and petitioner does not allege (nor is there) a conflict among the circuits on the question presented. There is no basis for further review.

Petitioner contends that the district court erred in admitting evidence about his marijuana-laden airplane, citing Rule 403 of the Federal Rules of Evidence (Pet. 2, 19). That Rule provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The determination whether evidence should be excluded under Rule 403 is discretionary with the district court and is properly reviewable only for abuse of discretion. *E.g., United States v. MacDonald*, 688 F.2d 224, 228-229 (4th Cir. 1982), cert. denied, 459 U.S. 1103 (1983).

Petitioner has shown no abuse of discretion here. He appears to argue (Pet. 12-20) that the discovery of his drug-laden airplane is only circumstantial evidence of drug

¹The court of appeals also held that the district court had correctly refused to admit certain evidence under the residual hearsay exception (Pet. App. A2, at 3-8) and that the government had no duty to turn over certain material to petitioner under *Brady v. Maryland*, 373 U.S. 83 (1963) (Pet. App. A2, at 8-10). Petitioner does not now challenge these holdings.

smuggling activity, and as such is *inherently* more prejudicial than probative. But as this Court wrote in its seminal decision concerning the net worth method, “[c]ircumstantial evidence in this respect is intrinsically no different from testimonial evidence.” *Holland*, 348 U.S. at 140. Indeed, as the Court noted in *Holland*, the government’s prosecution in a net worth case almost invariably rests on circumstantial evidence, since, if the government had direct evidence of tax evasion, resort to that method would not be necessary. See 348 U.S. at 124, 129, 135, 139-140. To be sure, the *Holland* Court stressed that “the courts must closely scrutinize” the use of the net worth method in view of the risks that its circumstantial mode of proof creates. But the safeguards whose use the *Holland* Court enjoined — careful establishment of opening net worth (348 U.S. at 132-134), effective negation of reasonable explanations by the taxpayer of his net worth increases (*id.* at 135-136), and evidence tying the net worth increases to a taxable source (*id.* at 137-138) — were all observed here.

There is thus no basis for petitioner’s assertion that, when illegal conduct is alleged as a likely taxable source of net worth increases, circumstantial evidence of such conduct “is of little probative value” (Pet. 19). To the contrary, this Court in *Holland* stated that “the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer’s books accurately reflects his financial history” (348 U.S. at 132). The Court in *Holland* specifically approved the government’s use of circumstantial evidence to negate nontaxable sources of net worth increases (*id.* at 133), and the courts of appeals have regularly approved the use of such evidence to establish criminal conduct as a likely taxable source. See, e.g., *United States v. Wright*, 667 F.2d 793, 799-800 (9th Cir. 1982) (narcotics dealing); *United States v. Goichman*, 547 F.2d

778, 781-782 (3d Cir. 1976) (misuse of funds). The circumstantial nature of the evidence about petitioner's airplane was thus no bar to its admissibility.

Contrary to petitioner's contention (Pet. 4-10), the court of appeals also correctly concluded that there was sufficient evidence to link him to the plane's cargo, and that introduction of this material was permissible even though the plane was not discovered until February 1980, shortly after the close of the last prosecution year. The discovery of the plane's cargo, while the principal fact on which the government relied to prove the likely source of petitioner's income, was merely the culmination of evidence which showed his involvement in drug smuggling. Petitioner was the record owner of the plane, which had been purchased in August 1978, and he presented no evidence that it had ever been stolen from him (Pet. App. A2, at 11). Although the plane was allegedly purchased for use in spraying to control mosquitoes (*ibid.*), it was not in fact used for that purpose until May 1979. The plane was modified so that the mosquito spray tanks were connected with the main fuel tanks, giving the plane a range far greater than that needed for its alleged intended use (*id.* at 11-12). Some 20,000 gallons of airplane fuel purchased by petitioner's corporation inexplicably disappeared during 1976-1978, including 1,600 gallons which vanished between "the close of business one night [and] its opening the next morning" (*id.* at 12). As the court of appeals noted, "[t]hese circumstances suggest[ed] a number of previous clandestine trips" by petitioner (*ibid.*).² The fact that the plane was discovered a month after the close of petitioner's 1979 taxable year was a factor to be considered

²Petitioner attempts (Pet. 5-11) to explain away the evidence linking him to the airplane, but these factual matters were resolved against him by the jury and are not appropriate for review by this Court.

by the jury, but it obviously did not preclude the government from introducing that evidence at all. See *Beard v. United States*, 222 F.2d 84 (4th Cir.), cert. denied, 350 U.S. 846 (1955).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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